Issues: Qualification – Compensation (In-Band Adjustment), and Compliance – Grievance Procedure (30-Day Rule); Ruling Date: December 13, 2017; Ruling No. 2018-4649; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified, and Grievant Not in Compliance.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2018-4649
December 13, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") on whether her August 31, 2017 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Registered Nurse at one of the agency's facilities, which is scheduled for closure. As part of the layoff process, the agency has elected to offer affected employees at this facility a retention bonus plan, which awards employees a progressively higher quarterly bonus, pursuant to the following conditions: that the employee has not used more than 100 hours of paid or unpaid leave during the quarter, and that the employee has not received a formal or informal corrective action (including counseling memoranda) during the quarter. On or about December 18, 2016, the grievant signed a "Progressive Retention Bonus Plan" agreement, accepting the terms and conditions of the facility's retention bonus plan. On June 27, 2017, the grievant was issued a "Formal Letter of Counseling" due to a second occurrence of a medication error. At that time, the grievant was advised that she would not be eligible to receive the quarterly bonus due to her receipt of this corrective action. On or about August 31, 2017, the grievant initiated a grievance to challenge her failure to receive the bonus for the April – June 2017 quarter. After proceeding through the management resolution steps, the agency head denied the grievant's request for qualification of her grievance for hearing, and she now appeals that decision to EEDR.

DISCUSSION

Compliance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.[1] When an employee initiates a grievance beyond the 30 calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed.

[1] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

In this case, the event that forms the basis of this grievance is the notification to the grievant that she would not be receiving the bonus, on June 27, 2017, when she received the Formal Letter of Counseling. Therefore, the grievant should have initiated her grievance within 30 days, i.e., no later than July 27, 2017. The parties do not dispute that the grievance was initiated on August 31, 2017. Because the grievant initiated her grievance more than 30 calendar days beyond the date on which she learned she would not be receiving the bonus, the grievance is untimely. Thus, the only remaining issue is whether there was just cause for the delay.

To this, the grievant acknowledges that she initiated the grievance outside of the required 30 calendar days, but states that she was waiting to see if her paycheck contained the bonus payment. This argument is not persuasive. EEDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.[2] A grievant's lack of knowledge about the grievance procedure and its requirements does not constitute just cause for failure to act in a timely manner. Thus, we conclude that the grievant has failed to demonstrate just cause for her delay in initiating the grievance. Although this grievance was not initiated timely and, therefore, would conclude upon this determination, EEDR will also address the issue of qualification.

Qualification

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to a hearing"[4] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

[2] *See, e.g.*, EDR Ruling Nos. 2006-1349, 2006-1350; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.
[3] *See* Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(C).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

Even assuming that an adverse employment action exists in this case, EEDR has thoroughly reviewed the evidence presented in this matter and cannot conclude that any specific policy requirement has been violated by the agency's adoption of the retention bonus plan or the grievant's failure to receive a bonus under its provisions. The primary policy implicated in this grievance is DHRM Policy 3.05, *Compensation*. This policy provides that agencies may offer retention bonuses in order to "encourage current employees to remain in specific critical positions" and requires that a formal written agreement be executed with each employee offered the bonus.[8] DHRM Policy 3.05 further provides that agencies must coordinate with the appropriate Cabinet secretary and DHRM in so doing.[9] Here, the agency indicates that its retention bonus plan was approved by the appropriate Cabinet secretary as well as DHRM.

Although the grievant may disagree with the provisions within the agency's retention bonus plan, EEDR has reviewed nothing that would suggest the parameters established by the agency violate a mandatory policy provision, disregard the pertinent facts or are otherwise arbitrary or capricious. Therefore, EEDR concludes that the grievant's August 31, 2017 grievance does not raise a sufficient question that policy was misapplied or unfairly applied such that the grievance would qualify for hearing if it had also been filed timely.[10]

EEDR's qualification rulings are final and nonappealable.[11]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

[8] *See* DHRM Policy 3.05, *Compensation*.
[9] *Id*.
[10] This ruling only determines that this issue does not qualify for a hearing under the grievance statutes. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to this claim.
[11] Va. Code § 2.2-1202.1(5).